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Supreme Court, U.S.
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IN THE

United States Supreme Court

NAM PYO KIM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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June 17, 2008

QUESTIONS PRESENTED

Whether the petitioner was denied the right to testify in his own defense and to call witnesses on his behalf because of the actions of Michael Mendelson, his retained counsel, who surreptitiously ended the defense case, without ever calling any witnesses, and then immediately commenced his summation?

Whether the petitioner was denied the effective assistance of counsel because his attorney, Michael Mendelson, was afflicted with Parkinson's Disease while representing the petitioner and never disclosed to the petitioner that he suffered from any physical and/or mental ailments that was obviously affecting his performance to such a degree that he failed to object to inadmissible and damning hearsay evidence against the petitioner from the Government's main witness, Freddy Castro Garzon and never made motions to dismiss the indictment against the petitioner at the conclusion of the government's case and the trial?

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POINT I.

THE RECORD IN THE CRIMINAL TRIAL, AS WELL AS THE TESTIMONY IN THE CIVIL PROCEEDING CONDUCTED IN CONNECTION WITH THE 28 U.S.C. 2255 PETITION, CLEARLY ESTABLISHES THAT THE PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS UNDER THE 5TH AND 6TH

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AMENDMENTS OF THE UNITED STATES CONSTITUTION. THIS IS EVIDENT FROM THE FACT THAT THE TRIAL LAWYER, MICHAEL MENDELSON, IN HIS OPENING STATEMENT TO THE JURY PROMISED THAT THE PETITIONER WOULD TESTIFY AND WOULD CALL WITNESSES ON HIS BEHALF. NEVERTHELESS, AT THE CONCLUSION OF THE PROSECUTION'S CASE MENDELSON SUDDENLY COMMENCED HIS SUMMATION WITHOUT CALLING ANY WITNESSES WHATSOEVER. FURTHERMORE, MENDELSON ASKED THE COURT NOT TO LET ANYONE KNOW THAT HE WAS EVEN RESTING HIS CASE BEFORE HE STARTED TO SUM UP. THEREFORE, THE TESTIMONY OF THE PROSECUTION'S WITNESSES WERE SUBSTANTIALLY UNCONTRADICTED BECAUSE MENDELSON UNILATERALLY DECIDED NOT TO ALLOW KIM TO TESTIFY OR CALL WITNESSES ON HIS BEHALF. THE PETITIONER WAS ALWAYS UNDER THE IMPRESSION THAT HE WOULD BE AFFORDED AN OPPORTUNITY TO TESTIFY AT TRIAL AND CALL WITNESSES ON HIS OWN BEHALF. THEREFORE, THE PETITIONER MAINTAINS THAT HE WAS DENIED A FAIR TRIAL, IN THE CONSTITUTIONAL SENSE, BY BEING DEPRIVED OF HIS RIGHT TO TESTIFY IN HIS OWN DEFENSE AND TO CALL WITNESSES ON HIS OWN BEHALF, AS WELL AS EFFECTIVE ASSISTANCE OF COUNSEL, ALL OF WHICH WAS IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES. 12-13

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IN THE

UNITED STATES SUPREME COURT

NAM PYO KIM,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

OPINIONS BELOW

Memorandum Order and Judgment of the United States District Court Southern District of New York dated December 12th, 2006 appears at appendix A of this petition.

The Summary Order of the United States Court of Appeals for the Second Circuit dated March 20th, 2008 appears at appendix B of this petition.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is predicated upon issues affecting the Due Process and Equal Protection Clauses of the Fourth, Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Rules 10(a) and 13(3) of this Court's rules, etc.

A Summary Order dated March 20th, 2008 was issued by the United States Court of Appeals. (Rule 13(3) of this Court's rules). The District Court denied to grant a certificate of appealability as to the issues presented herein.

A Memorandum Order and Judgment rendered in the United States District Court for the Southern District of New York by the Honorable Thomas Griesa on December 12th, 2006 denying the petitioner's Writ of Habeas Corpus.

Nam Pyo Kim originally appealed from a judgment of conviction rendered on October 20, 2005 after trial before Honorable Thomas Griesa, and a jury, in the United States District Court for the Southern District of New York. Mr. Kim was sentenced to forty-one months imprisonment to be followed by two years supervised release and payment of restitution. The petitioner was permitted to remain at liberty, on bail, pending appeal to the United States Court of Appeals for the Second Circuit. A timely Notice of Appeal was filed by the petitioner.

A motion in connection with a 28 U.S.C. Section 2255 petition was filed on behalf of Mr. Kim and was referred to Judge Griesa for a hearing. Upon the filing of the aforementioned motion, the United States Court of Appeals for the Second Circuit, on the 16th day of December, 2005, held the direct appeal in abeyance pending the outcome of a hearing which was conducted concerning the 28 U.S.C. 2255 petition.

A hearing was conducted before Honorable Thomas Griesa on November 29, 2006. Judge Griesa denied the relief sought by the petitioner and therefore an additional appeal was taken to United States Court of Appeals for the Second Circuit under Docket No. 06-CV-6188. That appeal was consolidated with the appeal from the conviction in the criminal action as set forth above. (*See* Docket No. 07-0052-cr). Timely Notices of Appeal were likewise filed from the determination and order of Judge Griesa in both the 28 U.S.C. 2255 petition and the trial.

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution Fourth, Fifth, Sixth and Fourteenth Amendments along with Due Process and Equal Protection Clauses thereof.

INTRODUCTION AND STATEMENT OF THE CASE

Nam Pyo Kim petitions for a Writ of Certiorari to review the Summary Order of the United States Court of Appeals for the Second Circuit.

While there are several significant issues presented in this petition for Certiorari, one of the main issues is whether the petitioner was denied effective assistance of counsel during his trial by his attorney, Michael Mendelson, who was suffering from a debilitating disease at the time of trial. We believe that trial counsel's physical condition

played a significant role in the manner in which he ineffectively handled the petitioner's trial. Mendelson's performance at trial was so inadequate and below the standard of what is expected of a criminal defense, that he failed to make any motions to dismiss the indictment or make timely objections to improper testimony. Even more disturbing, we maintain that Mendelson's conduct prevented the petitioner, as well as other witnesses, from testifying on his behalf.

The petitioner was convicted of one count of receiving stolen property, after a jury trial before Honorable Thomas Griesa, United States District Judge for the Southern District of New York, on the 27th day of January, 2005. Pursuant to the judgment of conviction above Mr. Kim was sentenced to an effective term of forty-one months of incarceration. Mr. Kim had never previously been convicted of any crime. Moreover, he is a successful businessman, who owns a jewelry store, and is a pillar in his community. Mr. Kim was not born in this Country and has a very limited grasp of the English language. The petitioner is presently awaiting designation of a correctional institution.

We maintain that the petitioner was denied the effective assistance of counsel at his criminal trial to such an extent that the representation by Mr. Mendelson can only be described as a mockery of justice for a variety of reasons as set forth herein and briefly mentioned above.

At the opening of the criminal trial Mr. Mendelson told the jurors that they should not make a determination of the facts until all of the evidence was elicited and in saying that he promised the jurors that Nam Pyo Kim would testify at the trial and call witnesses on his behalf. More specifically, in his opening statement, Mr. Mendelson promised the jury, three separate times, that Mr. Kim would definitely testify on his own behalf. Mr. Mendelson told the jury in his opening the following:

> *"I ask you, like the government, to take close attention to what is said. Don't make a judgment until my client has taken the stand and told you his side of the story and you have heard his witnesses."*

Mr. Kim was ready, willing and able to testify on his own behalf and in fact, prepared himself to do so, nevertheless, Attorney Mendelson never afforded him the opportunity to testify. Instead, Mr. Mendelson, whose office was well over a hundred miles from New York City, seemed to be more pre-occupied with the timing of his commute, to and from the Courthouse than how to most effectively represent Mr. Kim. When Mendelson was questioned about whether he fully discussed with Mr. Kim whether he would testify in his own defense, Mendelson claimed that he had several very brief conversations with Mr. Kim. Surprisingly, none of those alleged conversations were held in the presence of a Korean-English interpreter. Significantly, at all times during the trial Mr. Kim

was provided with the assistance of a Korean-English interpreter because of his lack of ability to comprehend the English language.

At the close of the Government's case, Mendelson clearly stated on the trial record that "he believes that Kim will testify." However, the next day without any explanation, Mendelson stated that the defense will rest without putting on any case whatsoever. There was no inquiry by the District Court as to whether the petitioner would waive his right to testify. Furthermore, when the government rested its case, Mr. Mendelson requested that the court not even inform the jury that the defense was also resting, without ever affording Mr. Kim the opportunity to testify on his own behalf. Even more disturbing, the petitioner maintains that he was never apprised by Mr. Mendelson that he would not be provided with the opportunity to testify. Equally troubling, the petitioner could not call any witnesses on his behalf because Mendelson spontaneously rested the defense case and then immediately commenced his summation which precluded the possibility of any such testimony.

During the civil hearing on the 28 U.S.C. 2255 petition, Mr. Kim was finally provided with an opportunity to testify. During said testimony Kim specifically denied that he had ever waived his right to testify at trial. More specifically, the petitioner stated that he was never informed by Mr. Mendelson that his opportunity to testify had been waived and that he would no longer be given the opportunity to call any witnesses on his behalf.

As a result of Mendelson's ineffectiveness, the Government's case was virtually uncontested during the criminal trial.

Furthermore, during the hearing conducted in connection with the 28 U.S.C. 2255 petition, attorney Mendelson unexpectedly revealed for the first time that at the time of trial he was suffering from Parkinson's Disease. Mendelson went on to state that he has suffered from this debilitating disease for many years, perhaps eleven or twelve years, but he insisted that it in no way impaired his ability as a lawyer. Counsel for the petitioner urged Judge Griesa to conduct a full hearing into this new circumstance and to determine whether or not Mendelson's physical condition should also be considered as a cause of his ineffectiveness.

Petitioner produced a letter which was presented as part of his appeal from John T. Hughes, M.D., a world recognized expert on Parkinson's Disease, who was asked to render a neurological opinion regarding the functioning of patients with Parkinson's Disease. Dr. Hughes stated that he had extensive experience in caring for such patients, and that he was "well published" in the area as well. Dr. Hughes explained the following:

> "What is established fact, is that up to thirty percent of Parkinson's patients may have an associated progressive sub-cortical dementia which frequently is the basis for significant dysfunction in memory, executive functioning, and attention. In addition, there was frequent-

> ly an associated mood disorder, which may also significantly impact upon cognitive function (*i.e.*, depression). Parkinson's Disease is typically treated with medications for tremor, rigidity, and bradykinesia. It is well known and accepted that these classes of medications frequently have neuropsychiatry side effects which can be the basis for psychiatric symptoms, poor attention, and poor memory, hallucinations, and acute delirium."

Dr. Hughes continued to opine:

> "In light of the above, it would be reasonable to conclude, therefore, that a person with Parkinson's Disease for a duration of ten years, could have potentially multi factorial reasons to experience cognitive changes which may have a significant impact upon his/her ability to function in a professional capacity, especially in the capacity of a lawyer. The cognitive limitations discussed specifically above are related to Parkinson's Disease alone but this does not rule out a secondary process where other dementing illness would certainly have a greater statistical incidence in patients greater than 75 years old. Please feel free to call me in my office to discuss any aspect of this matter in future detail."

We believe that it was error for the District Court to refuse to further review this new and significant revelation concerning Mr. Mendelson's physical ability to effectively represent the peti-

tioner, particularly because his condition was previously unknown until it was suddenly divulged during the hearing conducted in accordance with the 28 U.S.C. 2255 petition. Mr. Kim was never informed that Mendelson was suffering from such a debilitating condition.

After the civil hearing on the 28 U.S.C. 2255 petition, the District Judge made a determination that Mr. Kim had a number of character witnesses ready, willing and able to testify on his behalf at the criminal trial. Nevertheless, these witnesses were never called to testify. Instead Mendelson spontaneously decided to commence his summation. Mendelson's actions therefore preclude the possibility of any defense case going forward. The defense case consisted entirely of the hapless and ineffective cross-examination of the government's witnesses by Mr. Mendelson. This insured that the petitioner's defense resulted in nothing less than a mockery of justice because the government's allegations could not be contested by the petitioner and his witnesses, all of whom were anxiously waiting to testify that Mr. Kim was an innocent man and that the government's witnesses were not being truthful.

Equally troubling, attorney Mendelson never made any motions to dismiss the indictment against the petitioner during the trial. Such a motion to dismiss is typically made during criminal trials in Federal Court after the government's case is concluded, and if necessary, a similar motion is made after the defense has rested. The trial judge even

inquired whether Mr. Mendelson wanted to make motions and Mr. Mendelson indicated that he would take care of that at a later time. Nonetheless, no such motions were ever articulated to the Court.

Attorney Mendelson solidified his ineffectiveness when he permitted the government's main witness, Freddy Castro Garzon (hereinafter referred to as aka "Giovanny"), to testify about inculpatory conversations that he allegedly participated in with the petitioner. These conversations were not directly held between the petitioner and the witness. Instead, they were allegedly conducted through an uncertified translator named "Claudia", who was never called as a witness. Had Mendelson effectively represented the petitioner he would have objected to this damning and highly prejudicial testimony, which we maintain would have been precluded. Due to Mendelson's failure to object, "Giovanny" was permitted to testify that he conducted conversations with the petitioner by speaking in Spanish to "Claudia", who purportedly translated into English for Mr. Kim, who then allegedly responded in English to "Claudia", and then "Claudia" purportedly translated what Mr. Kim said back into Spanish to "Giovanny".

Furthermore, the government was permitted to allude to a number of very short telephone calls that were placed to Mr. Kim's telephone. Significantly, these calls were allegedly placed by an unknown person who was never produced as a witness. The inference that the prosecution was

unfairly permitted to draw was that the person who made these calls to Mr. Kim was involved in criminality and therefore Mr. Kim must have also been involved in criminality. Nevertheless, at the civil hearing conducted in accordance with the 28 U.S.C. 2255 petition, Mr. Kim explained that all telephone calls that were made to him would be answered in the Korean language and there was never any evidence that the supposed caller of these short phone calls, whoever that person was, understood the Korean language. This is consistent with why the duration of those telephone calls were so short. Nonetheless, the jury was never made aware of this testimonial evidence because of the conduct of attorney Mendelson, who failed to afford Mr. Kim with the opportunity to testify.

It should be noted that despite the fact that it was alleged that petitioner received stolen property, the Federal Agents who searched his premises never recovered any stolen property whatsoever. The aforementioned search was conducted with the full cooperation and consent of the petitioner and his family. The only evidence of stolen property linked to the petitioner came from the mouths of the self-confessed criminals who testified against Mr. Kim, all of whom received generous cooperation agreements in exchange for their testimony. It is inconceivable that a person who is purportedly in the profession of receiving stolen property would be in possession of absolutely no stolen property whatsoever, despite a thorough search for any such stolen items. This is especially true since this

search was conducted without any prior notification.

Significantly, one of the cooperating witnesses against Mr. Kim initially stated that it was not even Mr. Kim with whom he dealt. Instead, he claimed that it was a Jewish person. It is uncontested that the petitioner is not Jewish. Moreover, all of his employees have always been non-Jews of Korean descent.

REASONS FOR GRANTING THE PETITION

POINT I

THE RECORD IN THE CRIMINAL TRIAL, AS WELL AS THE TESTIMONY IN THE CIVIL PROCEEDING CONDUCTED IN CONNECTION WITH THE 28 U.S.C. 2255 PETITION, CLEARLY ESTABLISHES THAT THE PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS UNDER THE 5TH AND 6TH AMENDMENTS OF THE UNITED STATES CONSTITUTION. THIS IS EVIDENT FROM THE FACT THAT THE TRIAL LAWYER, MICHAEL MENDELSON, IN HIS OPENING STATEMENT TO THE JURY PROMISED THAT THE PETITIONER WOULD TESTIFY AND WOULD CALL WITNESSES ON HIS BEHALF. NEVERTHELESS, AT THE CONCLUSION OF THE PROSECUTION'S CASE MENDELSON SUDDENLY COMMENCED HIS SUMMATION WITHOUT CALLING ANY WITNESSES WHATSOEVER. FURTHERMORE, MENDELSON ASKED THE COURT NOT TO LET ANYONE KNOW THAT HE WAS EVEN RESTING HIS CASE BEFORE HE STARTED TO SUM UP. THEREFORE, THE TESTIMONY OF THE PROSECU-

TION'S WITNESSES WERE SUBSTANTIALLY UNCONTRADICTED BECAUSE MENDELSON UNILATERALLY DECIDED NOT TO ALLOW KIM TO TESTIFY OR CALL WITNESSES ON HIS BEHALF. THE PETITIONER WAS ALWAYS UNDER THE IMPRESSION THAT HE WOULD BE AFFORDED AN OPPORTUNITY TO TESTIFY AT TRIAL AND CALL WITNESSES ON HIS OWN BEHALF. THEREFORE, THE PETITIONER MAINTAINS THAT HE WAS DENIED A FAIR TRIAL, IN THE CONSTITUTIONAL SENSE, BY BEING DEPRIVED OF HIS RIGHT TO TESTIFY IN HIS OWN DEFENSE AND TO CALL WITNESSES ON HIS OWN BEHALF, AS WELL AS EFFECTIVE ASSISTANCE OF COUNSEL, ALL OF WHICH WAS IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES.

The petitioner herein, Nam Pyo Kim, was denied the effective assistance of counsel in violation of his constitutional rights under the 5th and 6th Amendments of the United States Constitution.

In a review of the facts of the testimony at both the criminal trial and the civil hearing, conducted in connection with the 28 U.S.C. 2255 petition, it is clearly evident that the petitioner was prevented and precluded from taking the witness stand in his own defense. During the criminal trial Mr. Kim's lawyer, Michael Mendelson, precluded that possibility by suddenly commencing his summation after the prosecution rested its case. Interestingly, defense counsel Mendelson requested that the court not reveal that he was even resting the defense case after the prosecution had finished its summation. This allowed Mendelson the opportunity to surreptitiously commence his summation without

ever informing Mr. Kim that the defense case was over and that he and his witnesses would be precluded from testifying.

Thus, it is obvious that the testimony adduced by the prosecution was virtually unopposed and uncontested. More importantly, the promise which attorney Mendelson made to the jurors that Mr. Kim would definitely testify and call witnesses on his behalf remained unfulfilled. Mendelson's urging that the jurors should not make up their minds until all the testimony was concluded, was a farce because no explanation was ever given to them, even during Mendelson's summation, as to why no defense witnesses, including Mr. Kim, were ever called to testify. Mendelson's failure to offer any explanation of that fact condemned the petitioner to a unfair conviction.

Equally disturbing is the fact that Mendelson admittedly had several sessions preparing Kim to take the witness stand at the trial, however, none of those sessions were conducted with the benefit of a Korean-English language interpreter. This is significant because the petitioner is of Korean descent and speaks very little English. It is uncontested that during all of the proceedings held before the District Court, Mr. Kim was provided with the aid of a Korean-English language interpreter. Mendelson admitted that he does not speak the Korean language and that he never had the benefit of an interpreter when he spoke with the petitioner. Mendelson claimed that using an interpreter was not necessary because Kim spoke fluent English.

Nevertheless, in open court Mendelson always maintained that the petitioner needed an interpreter to proceed with the various court proceedings and trial.

During the civil hearing on the 28 U.S.C. 2255 petition, Mr. Mendelson unexpectedly revealed that at the time of trial he was suffering from Parkinson's Disease. Mendelson went on to state that he has suffered from this debilitating disease for many years, perhaps eleven or twelve years. Nevertheless, he insisted that this debilitating disease in no way impaired his ability as a lawyer. Counsel for the petitioner urged Judge Griesa to conduct a full hearing into this new circumstance and to determine whether or not Mendelson's physical condition should also be considered as a cause of his ineffectiveness. The District Court refused to conduct such a hearing into Mendelson's physical condition.

Mr. Mendelson's admission that he was afflicted with Parkinson's Disease, for at least eleven years, clearly indicates that Mendelson was suffering from said condition for a number of years before the instant trial even began. Nevertheless, Mendelson never revealed his infirm physical condition to the petitioner. During the hearing before the District Judge, it became obvious that Mr. Mendelson was not physically well because of the way that he conducted himself. Nevertheless, the court was constrained to ask whether or not he was suffering from any particular illnesses. However, when Mendelson was confronted with his physical condi-

tion, by counsel for the petitioner, it was only then did he finally reveal that he suffered from Parkinson's Disease. Mendelson then attempted to provide a self-serving statement that at the time of the petitioner's trial, which was only a couple of years earlier, he was perfectly healthy.

This Court is well aware that the leading case in this country regarding effective assistance of counsel is *Strickland v. Washington*, 446 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984), whereby this Court declared that the test for determining effectiveness of counsel is whether counsel's conduct so undermines the proper functioning of the adversary process that the trial cannot be relied upon as having produced a just result. A defendant must show assistance was not reasonably effective. A high deference of course must be given and there is a strong presumption of reasonableness. A defendant must also show that but for counsel's errors there is a reasonable probability that the outcome would have been different.

It is the contention of the petitioner that his criminal trial certainly comes within the purview of the *Strickland, supra,* case. The petitioner was assured by his defense attorney that he would be afforded the opportunity to testify and call witnesses on his own behalf. In fact, this was the foundation upon which his defense was going to be based, particularly since the government's case relied almost exclusively on the testimony of convicted felons. Instead, the testimony of the government's witnesses was unopposed. To further

exacerbate the situation Mendelson promised the jury during his opening statement that the petitioner would testify and then inexplicably failed to deliver on his promise.

The petitioner was ready, willing and able to testify and had witnesses in the courtroom also willing to testify. Nevertheless, Mendelson precluded any such testimony by said witnesses by spontaneously commencing his summation to the jury. Due to his failure to call any witnesses whatsoever, the prosecution's case was virtually uncontradicted. Mendelson's unilateral decision to curtail the petitioner's trial without ever affording him the opportunity of putting on a case can only be characterized as the worst form of ineffective assistance.

Waiver of one's right to testify in his own defense must be intelligently and understandably made and cannot and will not be presumed from a silent record. *See Adams v. United States ex rel McCann*, 317 US 269, 63 S. Ct. 236, 87 L.Ed. 268 (1942); *Camley v. Cochrane*, 369 US 506, 82 S. Ct. 884, 81 L.Ed. 2d 70 (1962); *Doughty v. Maxwell*, 376 US 202, 84 S. Ct. 702, 11 L.Ed2d 550 (1964); *Swenson v. Bosler*, 386 US 258, 87 S. Ct. 996, 18 L.Ed2d 33 (1967); *Boykin v. Alabama*, 395 US 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969).

Various provisions of the United States Constitution guarantee a criminal defendant the right to testify in his own defense. (*See Rock v. Arkansas*, 483 US 44, 51 (1987); *Rega v. United States*, 263

F.3d 18, 21 (2d Cir. 2001) (*citing Rock v. Arkansas*, 483 USF 49-51); *United States v. Bifield*, 702 F2d 342, 349 (2d Cir. 1983)).

Moreover, this right is personal with the defendant and cannot be waived by defense counsel. (*See Brown v. Artuz*, 124 F.3d 73, 73 (2d Cir. 1997)).

Even the government in one of its memoranda admitted that as part of a trial counsel's "duty of effective assistance" is the "responsibility to advise the defendant concerning the exercise of this constitutional right." (*Brown v. Artuz*, 124 F.3d at 74; *See also id.* at 79) ("The burden of insuring that defendant is informed of the right to testify rests upon defense counsel . . .")

In assessing a defendant's claim that defense counsel "rendered ineffective assistance by preventing him from testifying or at least failing to advise him concerning his right to testify," the 2nd Circuit has instructed that "the two-part test established in *Strickland v. Washington* . . . . is to be used." (*Id.* at 74, *see also Rega v. United States*, 263 F.3d at 21 (*citing Brown v. Artuz, supra*).)

Significantly, there is absolutely no evidence in the trial record that suggests that the petitioner ever waived his right to testify or call witnesses on his behalf. Furthermore, the District Judge never made any inquiry or allocution as to whether the petitioner would invoke or waive his right to testify.

The petitioner had no prior criminal record whatsoever and had an outstanding reputation in

the community. He is a member of the Diamond Club and was awarded several different accolades for his community service work. Nevertheless, the jury was deprived of this essential information while weighing the petitioner's fate due to Mendelson's erratic and ineffective assistance. During the hearing conducted regarding the 28 U.S.C. 2255 petition, Mendelson tried to justify his actions at trial by claiming that the petitioner waived his right to testify. This assertion was contested by the petitioner who testified that he did not waive his right to testify or to call witnesses on his behalf.

The inconsistency between the petitioner and Mr. Mendelson regarding Mr. Kim's desire to testify and present a defense case clearly established that Mendelson was lying, or was otherwise unable to recollect the truth. Mendelson's veracity has to be questioned because of the circumstances surrounding how Kim allegedly waived his right to testify. No Korean-English language interpreter was employed during this supposed discussion whereby the petitioner expressed his desire to waive his right to testify. Mendelson claimed that the petitioner spoke fluent English, yet maintained that an interpreter was essential during the trial. These facts, combined with Kim's insistent claim that he was ready, willing and able to testify to contradict the lies of the cooperating witnesses of the prosecution, can only lead to one conclusion, that Mendelson's actions prevented the petitioner from producing an effective defense.

Additionally, we believe that character witnesses providing evidence of good character, which is favorable to an accused, could in itself provide reasonable doubt and a basis for an acquittal at trial. Nonetheless, this meaningful evidence was never furnished at trial for some inexplicable reason.

POINT II

THE PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEY, MICHAEL MENDELSON, WAS AFFLICTED WITH PARKINSON'S DISEASE WHILE REPRESENTING THE PETITIONER AND NEVER DISCLOSED TO THE PETITIONER THAT HE SUFFERED FROM ANY PHYSICAL AND/OR MENTAL AILMENTS THAT WERE OBVIOUSLY AFFECTING HIS PERFORMANCE TO SUCH A DEGREE THAT HE FAILED TO OBJECT TO INADMISSIBLE AND DAMNING HEARSAY EVIDENCE AGAINST THE PETITIONER FROM THE GOVERNMENT'S MAIN WITNESS, FREDDY CASTRO GARZON. FURTHERMORE, MENDELSON'S REPRESENTATION WAS SO INADEQUATE THAT HE NEVER MADE MOTIONS TO DISMISS THE INDICTMENT AGAINST THE PETITIONER AT THE CONCLUSION OF THE GOVERNMENT'S CASE OR AT END OF THE TRIAL.

Attorney Mendelson solidified his ineffectiveness when he permitted the government's main witness, Freddy Castro Garzon (hereinafter referred to as aka "Giovanny"), to testify about inculpatory conversations that he allegedly participated in with the petitioner. These conversations were not direct-

ly held between the petitioner and the witness. Instead, they were allegedly conducted through a uncertified translator, named "Claudia", who was never called as a witness. Had Mendelson effectively represented the petitioner he would have objected to this damning and highly prejudicial testimony, which we maintain would have been precluded.

Nevertheless, due to Mendelson's failure to object, "Giovanny" was permitted to testify that he conducted conversations with the petitioner by speaking in Spanish to "Claudia", who purportedly translated into English for Mr. Kim, who then allegedly responded in English to "Claudia", and then "Claudia" purportedly translated what Mr. Kim said back into Spanish to "Giovanny". "Giovanny" was a convicted felon, who already had pled guilty with respect to stealing the jewelry that he claimed that he sold to Mr. Kim. Therefore, "Giovanny's" testimony as to Mr. Kim's inculpating statements that were not directly said to him by Mr. Kim cannot be considered as insignificant. The failure to timely object to this form of testimony, in our view, amounts to ineffective assistance of counsel.

The issue as to whether failing to object to damaging hearsay testimony amounts to ineffective assistance of counsel was broached by the United States Court of Appeals for the Second Circuit in the case of *Henry v. Scully*, 78 F.3d 51 (2nd Cir. 1996), whereby the Court opined the following:

"The district court found that Henry was denied effective assistance of counsel at his trial because his counsel (1) failed to object to the admission in evidence against Henry of his co-defendant's confession and to the trial court's instruction that the jury could consider that confession as evidence against Henry; (2) *failed to object to damaging hearsay testimony (emphasis ours)*; and (3) failed to request a missing witness charge with respect to a confidential informant who did not testify at trial. On appeal, respondents-appellants contend that these asserted deficiencies were consistent with a trial strategy to engage in a straight credibility contest with the prosecution's witnesses, and in any event that the case against Henry was so strong that he cannot establish prejudice even if his counsel's performance is deemed deficient. *See Strickland v. Washington*, 466 U.S. 668, 687-96, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

We affirm the judgment of the district court substantially for the reasons set forth in the opinion of the district court, *see Henry v. Scully*, 1995 U.S. Dist. LEXIS 10062, 91 CIV. 7632 (KMW) (S.D.N.Y. July 14, 1995), and in the report and recommendation of Magistrate Judge Nina Gershon, *see Henry v. Scully*, 91 Civ. 7632 (KMW), slip op. (S.D.N.Y. Apr. 24, 1995).

The testimony of the one police officer who implicated him was Henry's strongest point at

> trial, defense counsel's failure to object to hearsay testimony used by the prosecution to explain away this fact was incomprehensible as a defense strategy. Finally, although the failure to request a missing witness charge, when the prosecution failed to call the informant, was perhaps not as egregious as the first two errors, counsel should have made such a request because there was no downside to doing so and there was a potential benefit to be gained. In any event, we express no view regarding whether one or two of these errors would have constituted ineffective assistance, for the aggregate effect of these three instances of inaction by defense counsel convinces us that the magistrate judge and district judge were correct in finding that Henry received ineffective assistance of counsel."

Similarly, in the instant matter, not only did defense counsel fail to object to impermissible hearsay testimony, he never requested a missing witness charge for "Claudia" the supposed "interpreter" of these alleged damning conversations between the petitioner and the government's main witness, Freddy Castro Garzon. Mendelson neglected to submit any requests to charge, except prior to trial providing them to another District Judge. This, of course, was hardly helpful under the circumstances because it was pretrial and did not refer to any of the testimony at the trial.

Equally disturbing, attorney Mendelson never made any motions to dismiss the indictment

against the petitioner during the trial. A motion to dismiss is typically made during criminal trials in Federal Court after the Government's case is concluded, and if necessary, a similar motion is made after the defendant has rested. The trial judge even inquired as to whether Mr. Mendelson wanted to make any such motions and Mr. Mendelson indicated that he would take care of that at a later time. Nevertheless, no such motions were ever articulated to the Court. Notwithstanding, Mendelson's assertions belie the facts as preserved by the record. It is obvious that Mendelson failed to make any motions at the conclusion of the government's case or after he rested on behalf of the petitioner. Such motions are a standard practice in virtually all federal criminal cases.

Strickland v. Washington, *supra*, requires:

> "a petitioner claiming ineffective assistance of counsel to show that (1) counsel's performance "fell below an objective standard of reasonableness," as measured under "prevailing professional norms," and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.""

Mendelson's failure to object to damaging hearsay testimony coupled with his failure to make any motions to dismiss the indictment after the conclusion of the government's case, further combined with the assertions raised in the first point of this petition, clearly establish that his performance fell

below an "objective reasonable standard" for an attorney. Similarly, considering that Mendelson's ineffectiveness permitted otherwise inadmissible, damning testimony into evidence from the government's main witness. Along with Mendelson's failure to make any motions to dismiss, combined with the issues raised in the first point, it cannot be argued that there is reasonable probability that the result would have been the same regardless of his deficient performance.

Like the U.S. Court of Appeals reasoned in *Henry, supra*, we ask this Court to consider the aggregate effect of Mendelson's substandard representation. We believe that when Mendelson's conduct of inaction is viewed under the standard as set forth in *Strickland, supra*, the petitioner was denied the right to a fair trial due to ineffective assistance of counsel. Therefore, we maintain that justice demands that the instant writ be granted.

CONCLUSION

Based on the foregoing, the writ should be granted.

Dated: New York, New York
June 17th, 2008

Respectfully submitted,

Irving Serota
Counsel of Record
JONATHAN STRAUSS
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New York, New York 10007
212-732-6366

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV/). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 20th day of March, two thousand and eight.

Present: HON. GUIDO CALABRESI,
HON. BARRINGTON D. PARKER,
Circuit Judges,
HON. STEFAN R. UNDERHILL,
*District Judge.**

NO. 05-6089-cr

UNITED STATES OF AMERICA,

Appellee,

– v. –

NAM PYO KIM,

Defendant-Appellant.

For Appellee:

DANIEL L. STEIN, Assistant United States Attorney (Celeste L. Koeleveld, Assistant United States Attorney, *of counsel*), for Michael J. Garcia, United

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* The Honorable Stefan R. Underhill, United States District Judge for the District of Connecticut, sitting by designation.

States Attorney for the Southern District of New York, New York, NY.

For Defendant-Appellant:
IRVING ANOLIK, Nanuet, N.Y.

UPON DUE CONSIDERATION of this appeal from a judgment entered in the United States District Court for the Southern District of New York (Griesa, *J.*), it is hereby **ORDERED, ADJUDGED, AND DECREED** that the appeal is **DISMISSED.**

Defendant-Appellant Nam Pyo Kim was convicted, following a four-day jury trial in January 2005, of receiving stolen property, in violation of 18 U.S.C. § 2315. In October 2005, Kim was sentenced to 41 months' imprisonment, followed by two year's supervised release,and ordered to pay a $100 special assessment. Restitution was ordered in the amount of $981,318.

On October 26, 2005, Kim timely filed a Notice of Appeal from his conviction. Shortly thereafter, on November 8, Kim filed a motion in district court pursuant to 28 U.S.C. § 2255, seeking vacatur of his conviction based on ineffective assistance of counsel. This Court ordered Kim's direct appeal held in abeyance pending the outcome of the § 2255 hearing in district court. The district court denied Kim's motion on November 29, 2006. Finding that Kim had failed to make a substantial showing of the denial of a constitutional right, the district

court also denied Kim's request for a certificate of appealability on December 12, 2006. Kim then filed an appeal to this Court from the denial of his § 2255 motion. In doing so, he sought, as required, a certificate of appealability from us. The appeal from the denial of the § 2255 motion was docketed separately from the direct appeal, and, though a series of letters between the parties confirmed their intention to have the two appeals consolidated, this was not done at the time. Thereafter, a panel of this Court reviewed Kim's § 2255 appeal and, by order dated March 1, 2007, declined to issue a certificate of appealability and, accordingly, dismissed the § 2255 appeal.

The direct appeal, not having been disposed of, is before us today. In his brief to us, Kim contends that his conviction should be vacated and he should be granted a new trial. In support, he makes substantially the same ineffective assistance of counsel arguments that he raised before Judge Griesa in the § 2255 hearing. On direct appeal he can make these arguments without a certificate of appealability.

When we are presented with claims of ineffective assistance in a direct appeal in the ordinary course, we may "(1) decline to hear the claim, permitting the appellant to raise the issue as part of a subsequent [28 U.S.C.] § 2255 [motion]; (2) remand the claim to the district court for necessary fact-finding; or (3) decide the claim on the record before us." *United States v. Leone*, 215 F.3d 253, 256 (2d Cir. 2000). The Supreme Court, however, has said that "in most cases a motion brought under § 2255 is

preferable to direct appeal for deciding claims of ineffective assistance." *Massaro v. United States*, 538 U.S. 500, 504 (2003). Consistent with *Massaro*, we decline to hear the claims on direct appeal. Usually, this would result in the claims being considered, subsequently, on a § 2255 petition. In the instant case, however, that consideration has already taken place, and we lack jurisdiction to review it. *See* 28 U.S.C. § 2253(c)(1)(B) ("Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from the final order in a proceeding under section 2255.").[2]

The appeal is therefore DISMISSED.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

By: _____

[2] Kim argues that his appeal from the denial of his § 2255 motion should be allowed as on March 20, 2007, an order was issued by the Acting Clerk of Court consolidating the direct appeal, No. 05-6089-cr, and the § 2255 appeal, No. 07-0052-pr, "for purposes of briefing and oral argument." As the issuance of a certificate of appealability has been denied by this Court, we lack jurisdiction to entertain such an appeal, *see* 28 U.S.C. § 2253(c)(1)(B), notwithstanding administrative orders that might suggest the contrary. We also note that to the extent Kim might be appealing Judge Griesa's decision to deny Kim's motion for a new trial, made pursuant to Rule 33 of the Federal Rules of Criminal Procedure during the interim between his trial and sentencing, we find that Kim has failed to present this argument, and we therefore deem it waived. *Tolbert v. Queens Coll.*, 242 F.3d 58, 75 (2d Cir. 2001).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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04 CR 503 (TPG)
06 CV 6188
28 U.S.C. § 2255
ORDER

UNITED STATES OF AMERICA,

– v. –

NAM PYO KIM,

Defendant.

Defendant requests that the Court issue a certificate of appealability pursuant to 28 U.S.C. § 2253. Because the Court finds that defendant has not made a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c)(2), his request is hereby denied.

SO ORDERED.

Dated: New York, New York
December 12, 2006

/s/ THOMAS P. GRIESA
Thomas P. Griesa
U.S.D.J.

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